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# In the Supreme Court of the United States

October Term, 1973

## No. 73-1351

**EDUARDO ANGEL, GEORGE LOPEZ, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,**

*Petitioners,*

*v.*

**EARL BUTZ, UNITED STATES SECRETARY OF AGRICULTURE,**

*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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No.

EDUARDO ANGEL, GEORGE LOPEZ, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

*Petitioners,*

*v.*

EARL BUTZ, UNITED STATES SECRETARY OF AGRICULTURE,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled case on November 13, 1973, petition for rehearing and request for rehearing *en banc* denied on December 7, 1973.

## OPINIONS BELOW

The opinion of the United States District Court for the District of Colorado granting petitioners' motion for partial summary judgment in which they sought a declaratory judgment is set out in Appendix A, but is unreported.

The ruling of the United States District Court for the District of Colorado denying petitioners' motion for summary judgment and granting respondents' motion for summary judgment is set out in Appendix B, but is unreported.

The opinion of the United States Court of Appeals affirming the judgment of the District Court is set out in Appendix C, and is reported at 487 F.2d 260 (1973).

The order of the Court of Appeals denying petitioners' petition for rehearing and request for rehearing *en banc* is set out in Appendix D.

## JURISDICTION

The judgment of the Court of Appeals (Appendix C, p. 35) was entered on November 13, 1973, and a petition for rehearing and request for rehearing *en banc* were denied by the Court of Appeals on December 7, 1973 (Appendix D, p. 41). Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## QUESTION PRESENTED

1. Did the Court of Appeals err by holding that the standard of review established by this Court in *Citizens to Preserve Overton Park, Inc. v. Volpe*, is not applicable to judicial review of an exercise of rule-making undertaken by the Secretary of Agriculture pursuant to the Sugar Act of 1948, 7 U.S.C. §1131(c)(1) (1970)?

## STATUTES AND REGULATIONS INVOLVED

1. 5 U.S.C. §706(2)(A), (1970): Scope of Review. To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall – . . . (2) hold unlawful

and set aside agency action, findings, and conclusions found to be – (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . .

2. 5 U.S.C. §553: Rule making.

(a) This section applies, accordingly to the provisions thereof, except to the extent that there is involved –

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include –

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply –

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public

procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except –

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy, or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

3. 7 U.S.C. §1131(c)(1) (1970): That all persons employed on the farm in the production, cultivation, or harvesting of sugar beets or sugarcane with respect to which an application for payment is made shall have been paid in full for all such work, and shall have been paid wages therefor at rates not less than those that may be determined by the Secretary to be fair and reasonable after investigation and due notice and opportunity for public hearing; and in making such determinations the Secretary shall take into consideration the standards therefor formerly established by him under the Agricultural Adjustment Act, as amended, and the differences in conditions among various producing areas: *Provided,*

*however*, That a payment which would be payable except for the foregoing provisions of this subparagraph may be made, as the Secretary may determine, in such manner that the laborer will receive an amount, insofar as such payment will suffice, equal to the amount of the accrued unpaid wages for such work, and that the producer will receive the remainder, if any, of such payment.

4. 1972 Wage Rate Determination, 7 C.F.R. 862 (1972): See Appendix E, p.42.

## STATEMENT OF THE CASE

This litigation began over four years ago, on December 12, 1969, when representatives of petitioners testified on behalf of migrant farmworkers, petitioner class herein, at the annual Wage Rate Hearings conducted by the United States Department of Agriculture (hereinafter referred to as the Department) pursuant to Section 1131(c)(1) of the Federal Sugar Act of 1948, 7 U.S.C. §1131(c)(1) (1970). At that time, petitioners, through their representatives, proposed several changes in the wage structure and enforcement procedures which had theretofore been adopted by the Secretary of Agriculture (hereinafter referred to as the Secretary). On April 13, 1970, the Secretary announced the Wage Rate Determination for that year, in which, with one inconsequential exception, all of petitioners' proposals were rejected. On December 16, 1970, the day the 1971 Wage Rate Hearings were being held in Denver, Colorado, petitioners filed this action in the United States District Court for the District of Colorado under 7 U.S.C. §1154, 28 U.S.C. §1337, and 5 U.S.C. §706, in which they challenged the Secretary's rejection of their proposals presented one year earlier. At the same time, petitioners once again, through their representatives, appeared and testified at the 1971 Wage Rate Hearings and made essentially the same proposals that were rejected in the 1970 Wage Rate Determination.

On April 12, 1971, the Secretary announced the 1971 Wage Rate Determination in which all of petitioners'

proposals, with the exception of proposals rendered moot because of successful suits brought by petitioners in federal court, were again rejected. On April 20, 1971, petitioners moved to amend the Complaint to challenge the Secretary's 1971 rejection of their proposals. An order granting petitioners' motion to amend their Complaint was granted by the U.S. District Court on April 22, 1971.

On August 31, 1971, petitioners filed a motion for partial summary judgment in which they sought a declaratory judgment that the Secretary had authority under the Federal Sugar Act of 1948 to adopt as regulations all of petitioners' proposals and a declaratory judgment that the "Statement of Bases and Considerations," made a part of the 1971 Wage Rate Determination, did not comply with the requirements of 5 U.S.C. §§556, 557, and 706(2)(D) and (E). On October 21, 1971, respondent filed a cross motion for judgment on the pleadings, or, in the alternative, for summary judgment, pursuant to Fed. R. Civ. P. 12(c) and 56(b), respectively.

In a Memorandum Opinion and Order issued on December 9, 1971 (set out in Appendix A, p. 21), Judge Arraj ruled as follows:

> ORDERED that the defendant's motion for a summary judgment that 5 U.S.C. §§556, 557, and 706(2)(E) are not applicable to his rule-making under the Sugar Act be and the same hereby is granted; it is further
>
> ORDERED that the plaintiffs' motion for a summary declaratory judgment that the Sugar Act would authorize the Secretary to enact regulations such as those recommended by the plaintiffs be and the same hereby is granted.
> [Appendix A, p. 29.]

Judge Arraj went on to deny petitioners' and respondent's motions for summary judgment to the extent not specifically

granted. In his decision, which respondents did not challenge on appeal, Judge Arraj found the following:

> Had the Secretary accepted the plaintiffs' recommended regulations and were his authority to promulgate them now being challenged, we would find the Secretary empowered to enact the regulations. The duty placed on the Secretary by §1131(c)(1) to set fair and reasonable wage rates could be rendered meaningless or no protection at all if, for example, producers may hire aliens in this country illegally, who are most unlikely to complain about wages or to bring any underpayment to the attention of the Secretary. Similarly, domestic workers, if intimidated by unchecked retaliatory measures by producers, might stop filing complaints or cooperating with the Secretary, rendering the wage requirements in practice unenforceable. . . . We would read the Sugar Act as granting the Secretary very broad powers to increase the real wage and working conditions of sugar workers. To enact all the regulations recommended by the plaintiffs' representatives would certainly be within the perimeter of this power.
> [Appendix A, p. 26-27.]

In December, 1971, subsequent to the District Court decision, petitioners once again appeared and testified at the 1972 Wage Rate Hearings conducted by the Department pursuant to the Sugar Act. And once again, petitioners proposed several regulatory changes vital to their welfare and protection, as set out in Appendix F, p. 61 . On April 12, 1972, the Secretary announced his Wage Rate Determination for 1972, in which he once again rejected each and every one of petitioners' proposals. In his Statement of Bases and Considerations accompanying the 1972 Wage Rate regulations, the Secretary set out at length his position that he lacked the authority to promulgate petitioners' proposed regulations, clearly contrary to the decision previously rendered by District Court Judge Arraj. *See* Appendix E, p. 42. Because of the Secretary's rejection of the District Court decision,

petitioners dutifully moved to amend this Complaint once again on May 2, 1972, to challenge the Secretary's rejection of their proposals in the 1972 regulations. Petitioners' motion to amend was unopposed and the Complaint was amended a second time.

On May 26, 1972, petitioners filed a motion for summary judgment in which they sought a declaratory judgment that the Secretary's 1972 rejection of their proposals was unlawful and for an order requiring the Secretary to establish as a matter of law a minimum hourly wage and an order remanding the matter to the Secretary for a new determination to be made by him in accordance with legal requirements. On June 9, 1972, respondent filed his cross motion to dismiss or, in the alternative, for summary judgment.

On July 7, 1972, oral argument was heard before Judge Arraj on both petitioners' and respondent's motions, after which Judge Arraj issued a ruling from the bench, as set out in Appendix B (p. 30), in which he denied petitioners' motion and granted respondent's motion for summary judgment. This oral ruling was formalized in an Order signed by Judge Arraj on July 11, 1972.

Petitioners appealed the July 11, 1972, Order of the District Court to the Court of Appeals for the Tenth Circuit, citing four issues on appeal:

a. The record before the District Court on review was not sufficient to permit the court to exercise its proper scope of review and was not sufficient to support the findings and conclusions of the Secretary of Agriculture contained in the Statement of Bases and Considerations appended to the 1972 Wage Rate Determination made by the Secretary pursuant to the Sugar Act of 1948.

b. The persistent erroneous position of the Secretary that he was without legal authority to

adopt appellants' proposals fatally taints the Secretary's 1972 Wage Rate Determination.

c. In rejecting appellants' proposals, the Secretary did so, not with reference towards best realizing the objectives of the Sugar Act, but with reference to irrelevant and extraneous considerations.

d. The Statement of Bases and Considerations is replete with errors of fact and law and with patent internal inconsistencies, demonstrating that the Secretary rejected appellants' proposals without any rational basis and failed to give appellants' proposals the serious and legitimate consideration required by law.

The case was heard by a three-judge panel on May 22, 1973. The Court of Appeals affirmed the judgment of the District Court in an opinion filed on November 13 1973. Appendix C, p. 35. The Court of Appeals stated that the primary case relied upon by petitioners, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), "has no application here." Appendix C, p. 38. The Court further rejected petitioners' arguments based on *Citizens to Preserve Overton Park* and on *D.C. Federation of Civic Associations v. Volpe*, 459 F.2d 1231 (D.C. Cir.), *cert. denied*, 405 U.S. 1030 (1972), on the grounds that these two cases did not deal "with the rule-making power of the Secretary." Appendix C. p. 39. The Court of Appeals concluded that: "In the promulgation of the wage rate rules under the Sugar Act the Secretary was exercising his legislative powers and if he considered an alleged improper reason along with one that was proper, that action in itself does not establish that the result was arbitrary or capricious." Appendix C, p. 40.

Petitioners' request for rehearing *en banc* and petition for rehearing were denied on December 7, 1973. Appendix D, p. 41.

## REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS HAS DECIDED FEDERAL QUESTIONS IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

A. The Decision of the Court of Appeals Does Not Follow the Standard of Review set out by this Court in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

1. The decision of the Court of Appeals improperly distinguishes this case from *Citizens to Preserve Overton Park, Inc. v. Volpe*, as clarified by this Court in *Camp v. Pitts*, 411 U.S. 138 (1973), on the grounds that the two decisions by this Court are not applicable to review of administrative agency rule-making conducted pursuant to §553 of the APA.

In *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), this Court set forth standards to guide judicial review of administrative action. While the standard of review set out in *Overton Park* is narrow, the *scope of review* which this Court said is necessary for courts to properly apply the narrower standard of review is quite broad. This Court ruled that courts must conduct a "substantial inquiry" and "a thorough, probing, in-depth review" of the agency action, based upon the court's reading of the "whole record" compiled by the administrative agency in making its decision. 401 U.S. at 415, 419. Later, in *Camp. v. Pitts*, 411 U.S. 138 (1973), this Court specifically applied the *Overton Park* standards in cases where the courts are called upon to determine whether an exercise of agency authority is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A) (1970). Review of this case likewise is to be conducted under 706(2)(A) standards. *See* Appendix B, p. 33; Appendix C, p. 38. Both the District Court and the Court of Appeals agreed that the Secretary of Agriculture's Wage Rate Determination is properly conducted pursuant to the general rule-making authority of Section 553 of the Administrative Procedure Act, 5 U.S.C. §553 (1970). *See* Appendix A, p.24-25; Appendix C.

p. 36, 38. This Court, however, has not yet specifically ruled that the standards of review set out in *Overton Park* are applicable to rule-making proceedings conducted pursuant to Section 553 of the Administrative Procedure Act.

It is important that this Court clarify the applicability of *Overton Park* to Section 553 rule-making cases for several reasons. First, the Tenth Circuit Court of Appeals has grossly misinterpreted *Overton Park* by deciding that *Overton Park* stands for the proposition that rule-making proceedings subject to review under 5 U.S.C. §706(2)(A) are *not* subject to the standard of review and scope of review guidelines set down by this Court. The Court of Appeals, in its opinion, distinguishes *Overton Park* as follows: "As stated in that decision [*Overton Park*], the action 'was plainly not an exercise of a rule-making function.' 401 U.S. at 414. It has no application here." Appendix C, p. 38. The court, however, appears to have misapprehended the thrust of this Court's statement in *Overton Park* quoted above. Petitioners in that case had argued that the very strict standards of review required by 5 U.S.C. §§706(2)(E) and (F) were applicable to reviewing the decision of the Secretary of Transportation, rather than the less strict standards provided for in 5 U.S.C. §706(2)(A). In responding to that argument, this Court stated, *in full*:

> Review under the substantial-evidence test [required by 5 U.S.C. §706(2)(E)] is authorized only when the agency action is taken pursuant to a rule-making provision of the Administrative Procedure Act itself, 5 U.S.C. §553 . . . . The Secretary's decision to allow the expenditure of federal funds to build I-40 through *Overton Park* was plainly not an exercise of a rule making function. . . . And the . . . hearing is nonadjudicatory, quasi-legislative in nature. [401 U.S. 414-415.]

Thus, this Court held the substantial evidence test required by Section 706(2)(E) to be inapposite. The very limited purpose of the Court's pointing out in *Overton Park* that the agency action was not pursuant to a section 553 rule-making function was to demonstrate that one of the two alternative bases for

applying the substantial evidence test was missing and that, the other basis being absent also, the standards set out in Section 706(2)(A) would govern the Court in its review of the Secretary's action. It is that same section which both parties and the Court of Appeals agree govern review of the Secretary of Agriculture's 1972 Wage Rate Determination in the case at bar. However, petitioners do not agree with the Court of Appeals that administrative action subject to review under Section 706(2)(A) are not also subject to the standards articulated by this Court in *Overton Park;* rather, petitioners agree with this Court's reasoning in *Camp v. Pitts* that the " 'plenary review' contemplated by *Overton Park*" is to be applied to judicial review of agency decisions governed by Section 706(2)(A).

Second, the interpretation of *Overton Park* made by the Court of Appeals would apply this Court's guidelines for scope of review and standard of review *only* to the kind of very informal proceeding conducted by Secretary Volpe in the *Overton Park* case, and *not* to relatively more formal proceedings under §553 rule-making authority such as the action of the Secretary of Agriculture in this case. While Courts of Appeals for at least eight other circuits have applied *Overton Park* to such informal agency action,[1] none of these

[1] D.C. CIRCUIT: *Adams v. Richardson*, 480 F.2d 1159, 1162 (1973); FIRST CIRCUIT: *Silva v. Lynn*, 482 F.2d 1282, 1283-1284 (1973); *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 478 F.2d 875, 881 and n.6 (1973); SECOND CIRCUIT: *Schicke v. Romney*, 474 F.2d 309, 314-315 (1973); *Monroe County Conservation Council, Inc. v. Volpe*, 472 F.2d 693, 700 (1972); *Hanly v. Kleindienst*, 471 F.2d 823, 829 (1972), *cert. denied*, 412 U.S. 908 (1973). THIRD CIRCUIT: *Delaware Citizens for Clean Air, Inc. v. Administrator, U.S. Environmental Protection Agency*, 480 F.2d 972, 975-976 (1973); FOURTH CIRCUIT: *Conservation Council of North Carolina v. Froehlke*, 473 F.2d 664, 665 (1973); *Cox v. United States*, 473 F.2d 334, 342, *cert. denied* 414 U.S. 869 (1973); FIFTH CIRCUIT: *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 466-467 (1973); *Named Individual Members of the San Antonio Conservation Society v. Texas*

cases support the narrow application of *Overton Park* made by the Tenth Circuit. Interestingly, the Tenth Circuit is also one of the only Courts of Appeals *not* to apply the *Overton Park* standards of review to cases involving the National Environmental Policy Act, *See National Helium Corporation v. Morton*, 486 F.2d 995, 1001 (10th Cir. 1973), as well as review of other agency action such as involved in this case. The Tenth Circuit *has* applied *Overton Park* to informal agency action in *Parker v. United States*, 448 F.2d 793 (10th Cir. 1971), *cert. denied sub nom. Kaibab Industries v. Parker*, 405 U.S. 989 (1972). Reading *Parker* and *Angel* together, one is necessarily led to the conclusion that the Tenth Circuit agrees that *Overton Park* applies to informal agency action, but does not apply to any more formal action such as rule-making under §553 of the APA. Petitioners disagree with this narrow interpretation of *Overton Park*; to the contrary, it is petitioners' position that *Overton Park* establishes minimum judicial standards for guiding the scope and standard of review that must be applied to *all* agency action, regardless of the degree of formality. And for some agency action, such as proceedings conducted pursuant to §554 (adjudication) and §§556 and 557 (formal proceedings) of the APA, the standards of review will be even more strict while the scope of review is as broad as that required under *Overton Park*. This Court should clarify the question of whether *Overton Park* establishes *minimum* standards of review applicable to all agency action, such as urged here by petitioners, or whether the Tenth Circuit Court of Appeals is correct in limiting the application of *Overton Park* to informal agency action.

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[1]Continued

*Highway Department*, 446 F.2d 1013, 1029 (1971); *cert. denied*, 406 U.S. 933 (1972); EIGHTH CIRCUIT: *Environmental Defense Fund, Inc. v. Froehlke*, 473 F.2d 346, 353 (1972); *Environmental Defense Fund, Inc. v. Corps of Engineers of U.S. Army*, 470 F.2d 289, 298, *cert. denied*, 409 U.S. 1072 (1972); NINTH CIRCUIT: *Washington Mutual Savings Bank v. FDIC*, 482 F.2d 459, 464 (1973); *Baciarelli v. Morton*, 481 F.2d 610, 612 (1973).

Third, decisions of other Courts of Appeals on the question of the applicability of *Overton Park* to agency rule-making proceedings reviewed pursuant to Section 706(2)(A), are at variance, although no other Circuit, to petitioners' knowledge, has restricted the application of *Overton Park* as done by the Tenth Circuit in this case. The following Court of Appeals decisions have applied the *Overton Park* standards to rule-making proceedings: *Portland Cement Association v. Ruckelshaus*, 486 F.2d 375, 386, 402 (D.C. Cir. 1973); *Bradley v. Weinberger*, 483 F.2d 410, 414-415 (1st Cir. 1973); *Chrysler Corp. v. Dept. of Transportation*, 472 F.2d 659, 669, 671 (6th Cir. 1972); *Buckeye Power, Inc. v. Environmental Protection Agency*, 481 F.2d 162, 171 (6th Cir. 1973). However, two circuits have ruled that whether or not an agency proceeding is rule-making is irrelevant to whether *Overton Park* is applicable. *See City of Chicago, Illinois v. Federal Power Commission*, 458 F.2d 731, 733, 741, 743 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972); *Appalachian Power Co. v. Environmental Protection Agency*, 477 F.2d 495, 500, 505 (4th Cir. 1973).

Therefore, since decisions of the Courts of Appeals differ on the question of the applicability of *Overton Park* to rule-making proceedings and whether *Overton Park* establishes minimum standards of review for *all* agency action, this Court should clarify the issues upon review of this case.

2. The Decision of the Court of Appeals improperly distinguishes this case from *Citizens to Preserve Overton Park, Inc. v. Volpe* on the grounds that *Overton Park* is limited to cases where agency action is measured against precise statutory standards.

The Court of Appeals in its Opinion also distinguishes *Overton Park* on the grounds that "[T]he facts in the Volpe case [*Overton Park*] were measured against statutory standards. . . ." Appendix C, p. 38. Such an interpretation of *Overton Park* would unduly limit the application of this Court's ruling. Furthermore, other Courts of Appeal have refused to so limit *Overton Park*. The following Court of Appeals decisions have applied *Overton Park* standards in the

absence of clear statutory standards: *Cox v. United States*, 473 F.2d 334, 342 (4th Cir.), *cert. denied*, 414 U.S. 869(1973); *Aquayo v. Richardson*, 473 F.2d 1090, 1103, 1106 (2d Cir. 1973); *American Federation of State, County, and Municipal Employees v. City of Cleveland*, 484 F.2d 339, 346-347 (6th Cir. 1973); *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 466 (5th Cir. 1973); *Rockbridge v. Lincoln*, 449 F.2d 567, 572 (9th Cir. 1971). The judicial scrutiny to which agency action is subject cannot be made to depend upon the statutory language employed to delimit the action to be taken by the agency, as the Tenth Circuit Court of Appeals has seemingly determined. That language is relevant only in narrowing or expanding the degree of discretion to be exercised by the agency, not the type or scope of review a court is to use in determining whether the agency legally carried out its legislative mandate. For this Court to let stand such an interpretation of its holding in *Overton Park* would effectively negate the kind of judicial review contemplated by Section 706(2)(A) of the Administrative Procedure Act. It is important, therefore, for this Court to clarify the applicability of the *Overton Park* standards for review to cases, such as this one, where the court's review is to be guided by Section 706(2)(A) of the Administrative Procedure Act, regardless of the generality or precision of the agency's statutory authority.

3. Neither the District Court nor the Court of Appeals was able to conduct the thorough, probing, in-depth review required by this Court in *Overton Park* because neither court had before it the "whole record" compiled by the Secretary of Agriculture in making his 1972 Wage Rate Determination.

By holding that *Overton Park* was in no way applicable to this case, the Court of Appeals clearly indicated either a grave misunderstanding or a fundamental disagreement with this Court's holding in *Overton Park* concerning the scope of review over agency action which reviewing courts must conduct. The whole record made by the Secretary was neither furnished to nor requested by the District Court, and *no* record was provided to the Court of Appeals by the Secretary, thus rendering impossible any compliance with the commands of *Overton Park* that the Court conduct a probing, in-depth review of the entire administrative record.

While other Courts of Appeals have required that the whole administrative record be provided to the court for review,[2] the Tenth Circuit has not so ruled. Therefore, this Court should articulate for the Tenth Circuit Court of Appeals the importance placed in having courts look at the whole administrative record when reviewing administrative agency action, rather than conducting its review in a near-vacuum as the Court of Appeals has done in this case.

B. The Decision of the Court of Appeals Erroneously Concluded that the Secretary's Action was Legislative and, Thus, Did Not Have To Be Based Solely on a Consideration of Relevant Factors, Contrary to Decisions of This Court and Other Courts of Appeals.

The Court of Appeals has erroneously concluded that, because the exercise of rule-making power by the Secretary of Agriculture in this case is "legislative," the Wage Rate Determination made by the Secretary need not be limited to relevant consideration. The Court of Appeals, in its Opinion, Appendix C at p. 40, sought to avoid the general mandate of *Overton Park* that the Secretary's determination be "based on a consideration of the relevant factors," 401 U.S. at 416, and the more specific holding in that regard of *D.C. Federation of Civic Associations v. Volpe*, 459 F.2d 1231 (D.C. Cir.), *cert. denied*, 405 U.S. 1030 (1972). The Court of Appeals

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[2] *See City of Chicago, Illinois v. Federal Power Commission*, 458 F.2d 731, 744 (D.C. Cir. 1971), *cert denied*, 405 U.S. 1074 (1972); *Bradley v. Weinberger*, 483 F.2d 410, 414-415 (1st Cir. 1973); *Silva v. Lynn*, 482 F.2d 1282, 1283-1284 (1st Cir.1973); *Schicke v. Romney*, 474 F.2d 309, 314-315 (2d Cir. 1973); *Appalachian Power Co. v. Environmental Protection Agency*, 477 F.2d 495, 507 (4th Cir. 1973); *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 467 (5th Cir. 1973); *American Federation of State, County, and Municipal Employees v. City of Cleveland*, 484 F.2d 339, 346 (6th Cir. 1973); *Chrysler Corp. v. Department of Transportation*, 472 F.2d 659, 671 (6th Cir. 1972); *Scherr v. Volpe*, 466 F.2d 1027, 1032 (7th Cir. 1972); *Environmental Defense Fund, Inc. v. Corps of Engineers of U.S. Army*, 470 F.2d 289, 301 (8th Cir.), *cert. denied*, 409 U.S. 1072(1972).

quoted *D.C. Federation* to the effect that impermissible considerations would not fatally taint the action taken by an administrator acting in a purely legislative capacity and that the action taken by the Secretary of Agriculture in the case at bar was of such a nature. The Court of Appeals in this case seems to take the extraordinary position that an agency acting in a rule-making capacity, exercising "legislative powers," is not constrained to act within the boundaries in which Congress has determined its discretion could operate, but is free to allow any factors it may choose to enter into its deliberations, no matter how legally irrelevant and impermissible, as long as the ultimate determination may, after the fact, be justified by reference to *some* permissible consideration, no matter how slight, and no matter how weighty were the impermissible considerations. *See* Appendix C, p. 39-40. Such is directly contrary to the teachings of a long line of decisions by this Court beginning with *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), and restated in *Overton Park*, making it clear that an agency is not at all on a par with Congress and may only act with reference to considerations made relevant by Congress in its limited delegation of power to the agency. Similarly, §553(c) of the APA states that, "after consideration of the relevant matter presented, that agency shall incorporate in the rules adopted a concise general statement of their basis and purpose." Thus, the APA specifically limits agency decisions to relevant factors, contrary to the position taken by the Court of Appeals. At a time when all branches of the federal government are keenly aware of the danger created when irrelevant and impermissible considerations are allowed to creep into governmental decision-making, this Court should reaffirm on review of this case the importance of its words in *Overton Park* that agency decisions must be based on relevant considerations.

C. Petitioners' Challenge Based Upon Deficiencies in the 1972 Statement of Bases and Consideration Has Not Been Rendered Moot by Either the 1973 or 1974 Wage Rate Determinations.

Because the administrative machinery of the Secretary of Agriculture moves more quickly than the important process of

the judiciary, the Secretary has issued Wage Rate Determinations in 1973 and 1974. While respondent may argue that these subsequent Wage Rate Determinations supersede the 1972 Wage Rate Determination challenged by petitioners, this Court should not dismiss this petition on grounds of mootness.

The Secretary's failure to adopt in either 1973 or 1974 the regulations proposed by petitioners in 1972 indicates a continuing rejection of petitioners' proposals. And the Secretary must be presumed to have rejected them on the same basis as expressed in the 1972 Statement of Bases and Considerations challenged by petitioners. The Court of Appeals did not accept respondent's argument below that the case is rendered moot and the 1972 Wage Rate Determination is superseded by the 1973 Wage Rate Determination. This Court should rule similarly and follow its own reasoning in *Roe v. Wade*, 410 U.S. 113 (1973), by not dismissing this petition on mootness grounds. For this Court to rule otherwise would allow the government to escape review of its action and would force petitioners to continually return to the District Court with an Amended Complaint, an alternative that would unnecessarily clog court dockets and keep alive a controversy that should be settled now.

## CONCLUSION

If the decision and reasoning of the Court of Appeals in this case to the effect that rule-making proceedings are not subject to review under the standards established by this Court in *Citizens to Preserve Overton Park, Inc. v. Volpe* and that decisions flowing from such rule-making proceedings can be based on irrelevant or improper considerations, then a significant body of administrative action will not be subject to the kind of judicial review contemplated by this Court. At the same time, an unacceptable trend toward unreasoned decision-making may not be stopped. Finally, the Tenth Circuit will remain out of step with most other circuits and this Court in these matters of law.

For the reasons set forth above, petitioners pray that this petition for writ of certiorari be granted.

Respectfully submitted,

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## Appendix A

## IN THE UNITED STATES DISTRICT COURT

## FOR THE DISTRICT OF COLORADO

**Civil Action C-2784**

EDUARDO ANGEL and GEORGE LOPEZ on behalf of themselves and all others similarly situated,
*Plaintiffs,*

*v.*

CLIFFORD HARDIN, United States Secretary of Agriculture,
*Defendant.*

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Mr. Jonathon B. Chase, Attorney at Law, Colorado Rural Legal Services, Inc., 1522 Broadway, P. O. Drawer 929, Boulder, Colorado, and Mr. Lawrence J. Sherman, Attorney at Law, Migrant Legal Action Program, 1820 Massachusetts Avenue, N.W., Washington, D.C., for Plaintiffs; Mr. James L. Treece, United States Attorney, by Mr. Leonard W. D. Campbell, Assistant United States Attorney, 323 U.S. Courthouse, Denver, Colorado, for Defendant.

### MEMORANDUM OPINION AND ORDER

ARRAJ, Chief Judge

Plaintiff sugar beet workers challenge the manner in which the Secretary of Agriculture has utilized or failed to utilize the rule-making power conferred upon him by the Sugar Act of 1948, as amended. 7 U.S.C. § 1100 et. seq. This Act conditions subsidy payments to sugar producers upon their complying with certain labor provisions, including paying workers a fair and reasonable wage and not employing child labor. The Act directs

the Secretary of Agriculture to determine "fair and reasonable" wage rates after an investigation, due notice and an opportunity for a public hearing. 7 U.S.C. § 1131(c)(1). The Secretary is also given broad authority to investigate and to "make such orders and regulations . . . as may be necessary to carry out the powers vested in him by this chapter." 7 U.S.C. § 1153(a).

It has been the practice of the Secretary to hold annual hearings at several different locations throughout the United States and allow interested persons to present oral testimony and make recommendations to the Secretary. Such hearings were held in Denver, Colorado in December of 1969 and 1970. Representatives of the plaintiffs appeared and submitted detailed recommendations designed to improve working conditions and to protect workers in a variety of ways; most of these recommendations were rejected. Plaintiffs contend that this rejection was arbitrary and capricious, that the Secretary did not give proper and sufficient reasons for his rejection, that his basis for the rejection was not supported by substantial evidence in the record, and, finally, that the Secretary rejected certain of the recommendations because of a *mistaken* belief that the Sugar Act did not confer upon him the *power* to enact these recommended regulations.[1]

Plaintiffs began this action challenging the Secretary's 1970 regulations, resulting from the hearings in December, 1969. On the same day the action was filed, the Secretary held his 1970 hearings to determine the regulations for 1971. After these regulations were issued, we granted the plaintiffs leave to amend their complaint to include their objections to the 1971

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[1] These regulations would have replaced the present system of submitting wage disputes to the Agricultural Stabilization and Conservation Service county committees with an arbitrator appointed by the State Bar Association, and would have provided for reduced subsidy payments to any producer who (i) retaliates against workers for asserting wage claims, (ii) knowingly employs aliens in the United States illegally, (iii) fails to secure a written employment contract signed by himself and the worker or (iv) fails to comply with the housing and sanitation regulations of the Wagner-Peyser Act.

regulations. More hearings will be held this month, followed shortly thereafter by the issuance of 1972 regulations.

The plaintiffs seek a partial summary judgment directing that the Secretary does have power to enact the regulations requested and that his decision to include or not to include the regulations must be clearly explained and supported by substantial evidence in the record. 5 U.S.C. §§556, 557, 706(2)(E). The defendant seeks dismissal or in the alternative a summary judgment in his favor. The Secretary contends that his rejection was not arbitrary or capricious and that 5 U.S.C. §§556, 557, 706(2)(E) do not apply to his rule-making under 7 U.S.C. §1100 et. seq. He also asks that this court support his position that the Sugar Act does not confer upon him the power to enact the plaintiffs' recommended regulations. The thrust of the defendant's argument is not that his interpretation of the power conferred by the Sugar Act is correct, but rather that it is not an "arbitrary and capricious" reading of the statute and that it should be afforded "great weight" by this court.

On the record before us we certainly cannot determine, as a matter of law, that the Secretary's rejection of the plaintiffs' regulations was "arbitrary and capricious" or that it was not arbitrary or capricious. We are, however, prepared to determine the procedure governing the Secretary's exercise of rule-making power (5 U.S.C. §553 or §§556, 557) and to examine and evaluate the scope and degree of rule-making power conferred upon the Secretary.

(1)

The Sugar Act was first passed in 1937 as part of President Roosevelt's New Deal legislation. The preamble of the Act stated as among its purposes the protection of "the welfare of consumers of sugar and of those engaged in the domestic sugar-producing industry." The House Report on the Act quoted approvingly the President's statement that if the sugar industry were to receive the benefits of a quota system, then "it ought to be a good employer." *H. R. Rep. No.* 1179, 75th Cong., 1st Sess. 2 (1937).

The Act provides that the Secretary of Agriculture shall set "fair and reasonable" wage rates which must be paid to the workers before a sugar producer may receive his government subsidy. The determination of the Secretary is clearly "rule making" under the Administrative Procedure Act. 5 U.S.C. §§551(4), 551(5). Section 553 governs rule-making, and states: "When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection." 5 U.S.C. §553(c). Sections 556 and 557 describe the requirements for administrative hearings of an adjudicatory nature and embody the "substantial evidence" scope of review. As we read the Sugar Act, it does not require rules to be made on the record after a hearing. The only requirements written into the Act are "due notice" and the "opportunity for a public hearing." Notice is a standard requirement of §553(b), and "public hearing" is far from the necessary requirement that the rules be "made on the record" after a hearing before §§556 and 557 come into play. The requirement of §1153(b) that the Secretary publish his rules and a statement of their bases and considerations in the Federal Register also is a simple restatement of what is anyway required by §553, and does not aid the plaintiffs' argument that 556 and 557 should be the applicable provisions.

There are basically just two, rather distinct, alternatives under the Administrative Procedure Act. Either the Secretary is free to exercise his discretion in carrying out the Congressional policy and need not state explicitly reasons for all his actions and justify them "on the record" or he is limited to the record before him and helpless to look beyond it in order to fulfill his statutory obligations. The Sugar Act was a humanitarian measure designed to protect a group of politically impotent and exploited workers. We cannot believe that a Congress concerned with protecting migrant sugar workers in 1937 would have left their welfare dependent upon their making a sufficient record for the Secretary of Agriculture to justify protective regulations. The Act placed the welfare of migrant sugar workers into the protective hands of the Secretary, intending that he investigate and make an independent determination of a fair and reasonable wage rate, and not that he act as a referee or

arbitrator to an adversary proceeding to determine such rates.

The plaintiffs urge that the protective hands of the Secretary serve to protect the farmer-producers and to smite the workers. Migrant workers' interest will be better protected, the plaintiffs argue, by forcing the Secretary to act on the record. Today many migrant workers have organized into labor unions and there are now legal service organizations and other groups to protect the workers' interests and to present their point of view. It is quite possible that Congress' original intent – to protect farm workers and to force sugar growers to be good employers – would be better served by casting the Secretary into the role of a referee and by fashioning annual hearings after the ICC rate-making proceedings. Whether or not such a change would be advisable, however, it is not the function of the courts to institute it. Courts will interpret statutory provisions with a view toward the intent of Congress, but we cannot rewrite statutory provisions or alter them however we believe will best implement Congressional purpose. This court can no more write-in a requirement that the Secretary of Agriculture now make his rules and regulations on the record than we could declare that the Secretary of Labor, instead of the Secretary of Agriculture should be responsible for setting rates and enforcing the labor provisions of the Sugar Act.

While today the plaintiffs might like to see such power in the judiciary, tomorrow they might be sorry. The thoughtfulness and the analytic approach to which the judiciary is suited is no substitute for the democratic check upon legislation provided by entrusting legislative power to the Congress. If Congress erred in entrusting the migrant workers' welfare to the Secretary of Agriculture, it is not our function to correct that error.

We conclude that the Secretary's power is governed by §553, and need not be made "on the record." The Secretary need not make the kind of statement of reasons requested by the plaintiffs, and his decisions need not be supported by "substantial evidence." 5 U.S.C. §706(2)(E). This of course does not mean that the Secretary may act arbitrarily or that his

action is not subject to review. He must act reasonably and his actions must be in furtherance of the intent of the Sugar Act – to protect the workers and make the recipients of sugar subsidies be good employers. As the Court said in *Labor Board v. Brown*, 380 U.S. 278, 291-92 (1965):

> Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions . . . . [W]here . . . the review is not of a question of fact, but of a judgment as to the proper balance to be struck between conflicting interests "[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." [Citing *American Ship Building Co. v. Labor Board*, 380 U.S. 300, 318 (1965).]

(2)

Most examinations of the scope of rule-making power granted by a statute have resulted from a claim that the administrator exceeded his powers in promulgating some particular rule. Cases urging an administrator to recognize and utilize additional power are more rare.

Had the Secretary accepted the plaintiffs' recommended regulations and were his authority to promulgate them now being challenged, we would find the Secretary empowered to enact the regulations. The duty placed on the Secretary by §1131(c)(1) to set fair and reasonable wage rates could be rendered meaningless or no protection at all if, for example, producers may hire aliens in this country illegally, who are most unlikely to complain about wages or to bring any under-

payment to the attention of the Secretary. Similarly, domestic workers, if intimidated by unchecked retaliatory measures by producers, might stop filing complaints or cooperating with the Secretary, rendering the wage requirements in practice unenforceable. Although a strict literal interpretation of §1131(c)(1) would not authorize the regulations in question, and a literal reading of §1153(a) would not authorize the sanction suggested by the plaintiffs,[2] courts have long recognized that remedial legislation must not be strictly read, or it will not serve to remedy the wrong Congress wished to alleviate. We would read the Sugar Act as granting the Secretary very broad powers to increase the real wage and working conditions of sugar workers. To enact all the regulations recommended by the plaintiffs' representatives would certainly be within the perimeter of this power. *See, United States v. Southwestern Cable Co.*, 392 U.S. 157, 172-77 (1968); *American Trucking Associations, Inc. v. United States*, 344 U.S. 298 (1953); 41 *Op. Att'y Gen.* 407 (1959).

The defendant questions whether the courts' examination should be the same when the administrator has decided he does not have certain rule-making power as it is when he has chosen to exercise a particular power. More specifically, the Secretary argues that his interpretation of the scope of his power should not be disturbed unless it is an unreasonable or capricious statutory construction, or at least that the administrative decision should be entitled to great weight.

It is true that many cases talk in terms of showing deference to the interpretation given to a statute by the body which is to administer the statute. Other cases, however, emphasize the importance of courts, not administrators, making legal decisions and insist that courts not abdicate their responsibility. *Compare Power Reactor Co. v. Electricians*, 367 U.S. 396 (1961) with *Labor Board v. Brown*, *380 U.S. 378* (1965). This apparent conflict is simply resolved by examining the underlying bases for the decisions rather than by studying their language and choosing between cliches.

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[2]Title 7 U.S.C. §1153(a) provides for a fine of not more than $100 for each violation of a rule or regulation issued pursuant thereto.

An examination of the cases which seem to show deference to the legal interpretations of statutes by administrators shows that at the heart of what may seem to be a simple statutory interpretation lies a factual determination requiring expertise, or at least utilizing the administrator's expertise. *See, e.g., Power Reactor Co. v. Electricians*, 367 U.S. 396, 408 (1961).

Here, the Secretary's legal conclusion could be based on his expertise only if the real reason for his alleged lack of statutory authority were his expert judgment that the regulations in question would not be valuable or useful in carrying out the purposes of the Sugar Act. In other words, the Secretary could have recognized that he has broad authority to promulgate regulations which would implement the Act, but thought that he did not have power to promulgate regulations unless they would be useful and valuable in carrying out the Act. In such a case, the Secretary would have evaluated the regulations on their merits and concluded that they were not desirable. His suggestion that he lacked the power to enact the regulations would be simply an indirect way of saying that in his judgment the regulations are not appropriate. This indirectness serves no good purpose; the Secretary saves no time and conserves no energy, since he had to evaluate the merits of the regulations anyway. To the extent that the Secretary's conclusion that he lacked statutory authority tends to obfuscate the particular reasons for which the Secretary concluded the regulations were not appropriate, it is important that the Secretary recognize and acknowledge his broad authority to promulgate regulations. If he then rejects the particular regulations as not being useful or desirable, his reasons will be clear and his evaluation of the regulations will not be confused.

On the other hand, the Secretary could be suggesting that even if he thought the plaintiffs' regulations were a very good idea and would serve the policy of the Sugar Act by protecting workers, that the Act just did not give him the power to pass them. In this case, the Secretary's decision would have nothing to do with the expertise he is charged with having and would be the kind of "pure" legal question for the court's determination.

In most cases, were an administrative interpretation of a statute to be overturned, it would frustrate the attempts of the administrator to carry out the duties and responsibilities with which the act charges him. In the instant case, however, the greatest harm it could cause the administrator is to remove a shield protecting him from the responsibility of his decisions. If, as the plaintiffs seem to suggest, the Secretary is insulating himself from political repercussions through an erroneous interpretation of the law, it is the proper business of the courts to step in and correct the interpretation.

Now, therefore it is

ORDERED that the defendant's motion for a summary judgment that 5 U.S.C. §§556, 557, and 706(2)(E) are not applicable to his rule-making under the Sugar Act be and the same hereby is granted; it is further

ORDERED that the plaintiffs' motion for a summary declaratory judgment that the Sugar Act would authorize the Secretary to enact regulations such as those recommended by the plaintiffs be and the same hereby is granted. It is further

ORDERED that to the extent not specifically granted herein, the motions of the plaintiff and defendant for summary judgment be and the same hereby are denied.

Dated at Denver, Colorado, this 9th day of December, 1971.

BY THE COURT:

/s/
ALFRED A. ARRAJ, Chief Judge
United States District Court

**Appendix B**

**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF COLORADO**

**C-2784**

| | | |
|---|---|---|
| EDUARDO ANGEL, et al, | ) | |
| | ) | |
| *Plaintiffs,* | ) | OFFICIAL TRANSCRIPT |
| | ) | |
| *vs.* | ) | |
| | ) | Ruling |
| | ) | |
| CLIFFORD HARDIN, etc., | ) | |
| | ) | |
| *Defendants.* | ) | |

Proceedings before the HONORABLE ALFRED A. ARRAJ, Chief Judge, United States District Court for the District of Colorado, beginning at 2:00 o'clock p.m., on the 23rd day of June, 1972, in Courtroom A, United States Courthouse, Denver, Colorado.

APPEARANCES:

JONATHAN CHASE, Attorney at Law, Denver, Colorado, and EDWARD CLAIR, Attorney at Law, Washington, D.C., appearing for the Plaintiffs.

W. ALLEN SPURGEON, Assistant United States Attorney for the District of Colorado, and KENNETH A. RUTHERFORD, Attorney, Department of Justice, appearing for the Defendants.

## RULING

THE COURT: Well, gentlemen, this case has posed really difficult problems for the Court. We have been with it now for something over a year, two years I guess now almost, and there comes a time I guess when something needs to be wound up, and let some other court take a look, if they would like.

First, now that we have the matter of the defendants' claimed lack of jurisdiction straightened out, that is to the extent of what their basic claim is, that is that this Court cannot rewrite the regulations, I agree that we can't. It is not the function of the Court, so for the purposes of this case in the posture it is presently in I find that we do have jurisdiction of the parties and the subject matter of this action.

As I indicated earlier in colloquy with counsel, it seems to me that the Secretary in his determination which is now before the Court to considerable extent continued to debate more or less the merits of this Court's decision. He says that in substance he did not have the authority to promulgate certain regulations, but inasmuch as the Court said that he did, why, he went ahead, albeit in this Court's opinion rather grudgingly, and this is a situation which creates an unhappy situation as far as a Court is concerned. Too many administrative agencies, and this one certainly seems to have adopted this principle, feel that they are omnipotent or all-powerful in their respective spheres. Although they do have or are supposed to have certain expertise, they are willing to rely upon that expertise, but the expertise is not in interpreting case law. That the Supreme Court or other courts, Courts of Appeals, may determine. That as I have perceived the separation of powers is the function of the judicial branch of the government and not the executive branch to say, but maybe it was just lip service, but, nevertheless, in his report I think he some way or other was able to gather up enough acceptable phrases and statements which probably or possibly do indicate that he did make some evaluation on the merits of the proposals and the regulations which followed.

The Court does not agree with counsel for the plaintiff that it appears patent from what has resulted here that the Secretary applied an impermissible standard in evaluating these regulations. I think counsel for the defendant put it in the proper perspective. We are not here to determine whether or not the proposals which the plaintiff made should be the regulations. What we are here to determine as I view it basically is whether or not the regulations that the Secretary promulgated after considering the proposals made by the plaintiffs are such as can stand the attack of their being arbitrary and capricious and having no rational basis, and by applying that test to the particular phase or phases of the regulations which seem to be the focus of the attack here I think the Court must find that the plaintiffs have failed to demonstrate that the regulations promulgated or that in promulgating these regulations the Secretary acted arbitrarily or capriciously.

The argument that plaintiff makes about the minimum wage law or the minimum wage to be paid being one necessary to permit the workers to have a reasonable standard of living is an appealing relation, but I think that the fair and reasonable standard that Congress speaks of here does not only mean fair and reasonable to the worker, but it also means fair and reasonable to the grower, and that I think is the consideration which the Secretary did take into account in the regulation dealing with the minimum hourly wage.

The example which counsel for the plaintiff gave in closing argument regarding the examination of the field and negotiating the higher piece work price if the field were weedy or otherwise difficult to work is a fair example, but also the suggestion that plaintiff's counsel made, that is if the field seems to be a difficult one from the standpoint of excessive number of weeds or for other reasons difficult to hoe or to otherwise work, then the two dollar wage could be negotiated upward, that is a floor. That is the minimum, so in either event it leaves an opening there for negotiation, and I cannot say that the regulation which does provide for an hourly minimum with the work paid on an hourly basis with the alternative for piece work compensation, which piece work compensation would result in a lesser daily wage or remuneration, I cannot say that the

Secretary in promulgating that acted arbitrarily and capriciously. The Secretary has broad authority in this area, that is what he may consider.

As I previously mentioned, the fair and reasonable standard should and does I believe apply to the grower as well as the worker. The costs of production and other such items can properly be taken into consideration by the Secretary in reaching these agreements.

I believe that those are the only matters that were really focused on in the argument today, although there is some argument in the briefs and so forth on the housing regulation and some objection was made to the fact that the evidence in that area was limited by the Secretary or his delegate, but we believe that every item that's concerned in the regulations did not necessarily require an open hearing and an opportunity for everyone who wishes to testify to do so.

There being no genuine issue of fact remaining here, no controverted facts unresolved, I find that the Secretary did not act arbitrarily and capriciously in promulgating the regulations, that there is a rational basis for the regulations that were promulgated, and therefore I deny the motion for a summary judgment of the plaintiffs and the motion to dismiss the complaint, and at this stage the cause of action, will be granted, so that the case may be in a posture for appeal.

Mr. Rutherford, you will prepare an appropriate order and submit it, please. I believe that concludes the matter and we will be in recess.

(Whereupon, the proceedings were concluded.)

## REPORTER'S CERTIFICATE

I, Donna G. Spencer, Certified Shorthand Reporter and Official Reporter to this Court, do hereby certify that I was present at and reported in shorthand the proceedings in the foregoing matter;

Further, that I thereafter reduced my shorthand notes reflecting the ruling of the Court to typewritten form, comprising the foregoing Official Transcript;

Further, that the foregoing Official Transcript is a full and accurate record of the ruling of the Court at the conclusion of the proceedings.

Dated at Denver, Colorado, this 7th day of July, 1972.

/s/
Donna G. Spencer
Certified Shorthand Reporter

## Appendix C

**UNITED STATES COURT OF APPEALS**
**TENTH CIRCUIT**

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NOVEMBER TERM – 1973

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| | | |
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| EDUARDO ANGEL and GEORGE LOPEZ, on behalf of themselves and all others similarly situated, | ) | |
| *Plaintiffs-Appellants,* | ) | |
| *v.* | ) | No. 72-1727 |
| EARL L. BUTZ, United States Secretary of Agriculture, | ) | |
| *Defendant-Appellee.* | ) | |

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(No. C-2784)

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James Phelan, Denver, Colorado, and Jonathon B. Chase, Boulder, Colorado, for Plaintiffs-Appellants.

Anthony J. Steinmeyer, Department of Justice, Washington, D.C. (Harlington Wood, Jr., Assistant Attorney General, James L. Treece, United States Attorney, and Walter H. Fleischer Department of Justice, Washington, D.C., with him on the brief), for Defendant-Appellee.

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Before PICKETT, McWILLIAMS and BARRETT, Circuit Judges.

PICKETT, Circuit Judge.

As required by 7 U.S.C. §1131(c)(1) (1970) of the Sugar Act of 1948, as amended, the Secretary of Agriculture in 1971 and 1972, as in previous years, determined the wages required to be paid to persons engaged in the growing of sugar beets on farms in Colorado.[1] Representatives of the workers appeared at public hearings prior to the adoption of wage schedules and made recommendations to the Secretary concerning wage schedules and other matters not directly related to wages.[2] Except for some increase in the wage structure, substantially all of the workers' demands were rejected. Following the promulgation of the rules the Secretary immediately published them together with a statement of the bases and considerations upon which they were determined, as required by 7 U.S.C. §1153 (1970).[3]

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[1]The pertinent part of §1131(c)(1) is as follows:

"That all persons employed on the farm in the production, cultivation, or harvesting of sugar beets or sugarcane with respect to which an application for payment is made shall have been paid in full for all such work, and shall have been paid wages therefor at rates not less than those that may be determined by the Secretary to be fair and reasonable after investigation and due notice and opportunity for public hearing; and in making such determinations the Secretary shall take into consideration the standards therefor formerly established by him under the Agricultural Adjustment Act, as amended, and the differences in conditions among various producing areas: . . ."

[2]The additional proposals include subjects such as a written contract for all labor to be performed; an arbitration panel to consider wage disputes; penalty for employment of aliens unlawfully in the United States; housing without cost to workers; and mileage for interstate transportation of workers.

[3]The Administrative Procedure Act, 5 U.S.C. §553(c), requires "a concise general statement of their basis and purpose" to be incorporated in rules adopted by an agency. This section also provides that "[w]hen rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title shall apply instead of this subsection."

This class action was brought by representatives of the workers seeking a judgment declaring the regulations to be invalid because rejection of the "proposed regulations was arbitrary, capricious, and constituted an abuse of discretion." The trial court concluded that there was no genuine issue of material fact, granted the Secretary's motion for summary judgment and dismissed the action. The workers first contend that the record before the District Court was insufficient to support the Secretary's references that are a part of the "Statement of Bases and Considerations" which is included in the 1972 wage rate determination.

The purpose of the Sugar Act of 1948 was to protect the welfare of consumers of sugar in the United States and those engaged in the production of sugar. To accomplish this purpose, quotas for the production of sugar beets and sugarcane were fixed, the importation of sugar was regulated in a manner resulting in the control of sugar prices and provision was made for the payment of subsidies to the growers of sugar beets and cane. One of the statutory conditions for the receipt of the subsidies was a requirement that producers pay to field workers the wages determined by the Secretary to be fair and reasonable. The issues in this case arise from the failure of the Secretary, in making his determination of fair and reasonable wages, to accept the demands made by representatives of the workers. The statute anticipates that the Secretary will, prior to a determination of the wages to be paid, make an adequate investigation and hold public hearings to afford an opportunity for interested parties, including sugar beet workers and producers, to be heard. The hearing, however, is not an adversary proceeding and is only a portion of the investigation to be made by the Secretary. The Secretary determines what are fair and reasonable wages from the entire investigation. This determination is nonadjudicatory and in the nature of legislative action. The statute does not require that the wage determination be made only on a formal record after a public hearing. United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742 (1972); Mobil Oil Corp. v. F.P.C., 469 F.2d 130, 139 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 931 (1973), California Citizens Band Association v. United States, 375 F.2d 43 (9th Cir.), *cert. denied*, 389 U.S. 844 (1967); Flying Tiger Line, Inc.

v. Boyd, 244 F. Supp. 889 (D.D.C. 1965). In exercising this legislative function the Secretary should consider evidence formally presented at hearings, but may rely upon his own expertise and other relevant material available to him. Pacific Coast European Conference v. United States, 350 F.2d 197 (9th Cir.), *cert. denied,* 382 U.S. 958 (1965); Flying Tiger Line, Inc. v. Boyd, 244 F. Supp. 889 (D.D.C. 1965).

To sustain their position that the record is inadequate the workers rely primarily upon Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971). As stated in that decision, the action "was plainly not an exercise of a rulemaking function." 401 U.S. at 414. It has no application here. The facts in the *Volpe* case were measured against statutory standards authorizing the expenditure of public funds on highways to be constructed through public parks only if a "feasible and prudent" alternate route did not exist. The local citizens claimed that in authorizing expenditures for a highway through a park the Secretary acted in violation of "clear statutory provisions." The court stated that "if the statutes are to have any meaning the Secretary cannot approve the destruction of parkland unless he finds that alternative routes present unique problems." 401 U.S. at 412. No contention is made in the instant case that the rules adopted were in conflict with any federal statute. The attack is upon the regulations themselves, not upon their administration.

In the exercise of the rulemaking power the test of the validity of the Secretary's action is whether his action was arbitrary, capricious, or an abuse of discretion. The burden was upon the workers to establish this fact. New York Foreign Freight Forwarders and Brokers Association, Inc. v. Federal Maritime Commission, 337 F.2d 289 (2d Cir. 1964), *cert. denied,* 380 U.S. 910 (1965); Regular Common Carrier Conference v. United States, 307 F. Supp. 941 (D.D.C. 1969); 2 K. Davis Administrative Law Treatise § 14.14 (1958). The determination of the regulations was made by an appropriate official of the Department of Agriculture. In a discovery deposition he gave testimony concerning the investigation and the materials available to him in making his determination. He stated that consideration was given to all recommendations made, including

those of the sugar beet growers and the workers. This material was also reviewed in the "Statement of the Bases and Considerations" filed with the adopted regulations including reasons for the rejection of the workers' proposals. The purpose of the public hearing was to afford an opportunity for interested parties, including the workers and sugar beet growers, to have their say. The Secretary was not required to accept the recommendations of either. His refusal to accept such recommendations or his limited explanation of why any of them were rejected is no indication that he acted arbitrarily. The record was adequate for the disposition of the issues. *See* American Trucking Associations, Inc. v. United States, 344 U.S. 298 (1953); Automotive Parts and Accessories Association, Inc. v. Boyd, 407 F.2d 330 (9th Cir. 1968).

Throughout the proceedings the Secretary has maintained that his statutory authority was limited to fixing wage rates and that he was without jurisdiction to regulate other working conditions as demanded by the workers. The District Court held that the broad authority of the statute authorized the Secretary to make regulations pertaining to these demands.[4] When the 1972 regulations were promulgated the Secretary made it clear that the workers' proposals were rejected not only because it was believed that they were not authorized by the Sugar Act, but also that "they were deemed to be impractical and undesirable . . . ." It is now argued that the "lack of authority" position of the Secretary was erroneous and if it had any influence on the final determination of the wage rates they cannot stand. In support of this view reference is made to D.C. Federation of Civic Associations v. Volpe, 459 F.2d 1231 (D.C. Cir.), *cert. denied*, 405 U.S. 1030 (1972), as being "remarkably similar to the one at bar." The District of Columbia case is not similar to this case, but is more like Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971), which was concerned with the question of whether the Secretary had complied with statutory provisions in the allocation of funds for the construction of a highway on existing park lands. Neither of the cases dealt with the rulemaking power of the Secretary. The

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[4] We do not decide the correctness of this decision.

difference in these cases and the instant case is illustrated by the District of Columbia decision, which said:

> "if, on the other hand, the Secretary's action had been purely legislative, we might have agreed with the District Court that his decision could stand in spite of a finding that he had considered extraneous pressures. Beginning with Fletcher v. Peck, [10 U.S. (6 Cranch) 87 (1810)] the Supreme Court has maintained that a statute cannot be invalidated merely because the legislature's action was motivated by impermissible considerations (except, perhaps, in special circumstances not applicable here.) . . ." 459 F.2d at 1247.

In the promulgation of the wage rate rules under the Sugar Act the Secretary was exercising his legislative powers and if he considered an alleged improper reason along with one that was proper, that action in itself does not establish that the result was arbitrary or capricious. *Cf,* Palmer v. Thompson, 403 U.S. 217 (1971); United States v. O'Brien, 391 U.S. 367 (1968). The workers' case has been very forcefully and thoroughly presented; however, we think the arguments have strayed from the narrow question of whether the Secretary, in the exercise of his rulemaking powers, acted arbitrarily or capriciously.

AFFIRMED.

## Appendix D

**NOVEMBER TERM – DECEMBER 7, 1973**

Before Honorable David T. Lewis, Chief Judge, Honorable John C. Pickett, Senior Circuit Judge, Honorable Delmas C. Hill, Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett and Honorable William E. Doyle, Circuit Judges

| | | |
|---|---|---|
| EDUARDO ANGEL and GEORGE LOPEZ, on behalf of themselves and all others similarly situated, | ) | |
| *Plaintiffs-Appellants,* | ) | No. 72-1727 |
| *v.* | ) | |
| EARL L. BUTZ, United States Secretary of Agriculture, | ) | |
| *Defendant-Appellee.* | ) | |

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing en banc filed by the appellants in the captioned case.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges Pickett, McWilliams and Barrett, to whom the case was argued and submitted.

The petition for rehearing having been denied by the original panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the petition for rehearing en banc is denied.

/s/
HOWARD K. PHILLIPS,
Clerk

## Appendix E

## 1972 WAGE RATE DETERMINATION

### RATES
### PART 862 – WAGE RATES; SUGAR BEETS

Pursuant to the provisions of section 30(c)(1) of the Sugar Act of 1948, as amended (herein referred to as "act"), after investigation and consideration of the evidence obtained at the public hearings held during December 1971, the following determination is hereby issued.

The regulations previously appearing in these sections under "Determination of Wage Rates; Sugar Beets" remain in full force and effect as to the crops to which they were applicable.

Sec.

862.9 General requirements.
862.10 Wage rates.
862.11 Compensable working time.
862.12 Applicability of wage requirements.
862.13 Payment of wages.
862.14 Evidence of compliance.
862.15 Employment of workers through a labor contractor or crew leader.
862.16 Subterfuge.
862.17 Claim for unpaid wages.
862.18 Failure to pay all wages in full.
862.19 Child labor.
862.20 Checking compliance.

AUTHORITY: The provisions of this Part 862 issued under secs. 301, 403, 61 Stat. 929, as amended, 932; 7 U.S.C. 1131, 1153.

**§862.9 General requirements.**

A producer of sugar beets shall be deemed to have complied with the wage provisions of the act if all persons

employed on the farm in the production, cultivation, or harvesting of sugar beets, as provided in §862.12, shall have been paid in accordance with the following:

**§862.10 Wage rates.**

All such persons shall have been paid in full for all such work and shall have been paid wages therefor at rates required by existing legal obligations, regardless of whether those obligations resulted from an agreement (such as a labor union agreement) or were created by State or Federal legislative action, or at rates as agreed upon between the producer and the worker, but not less than the following, which shall become effective on April 24, 1972, and shall remain in effect until amended, superseded, or terminated:

(a) When employed on a time basis: For the hand labor operations of thinning, hoeing, hoe-trimming, blocking and thinning, weeding, pulling, topping loading, or gleaning: $2 per hour: *Provided,* That for workers 14 or 15 years of age the hourly rate specified herein may be reduced by not more than 15 percent.

(b) When employed on a piecework basis for the hand labor operations in the following table:

| Hand labor operations: | *Rate per acre* |
|---|---|
| A. Thinning: Removing excess beets with a hoe only | $14.50 |
| B. Hoeing: Removing weeds and excess beets with a hoe only | 19.00 |
| C. Hoe-Trimming: Removing weeds with a hoe and by hand and removing excess beets with a hoe only | 22.50 |
| D. Weeding: Removing weeds with a hoe and by hand following either A, B, or C above, E below, or following the operation specified in paragraph (c) of this section | 12.00 |
| and in the State of California only: | |
| E. Blocking and Thinning: Removing weeds and excess beets with a hoe and by hand | 32.00 |

*Wide row planting:* The above rates and the rate provided for in paragraph (c) of this section may be reduced by not more than the indicated percentages for the following row spacing: 28 inches or more but less than 31 inches, 20 percent; 31 inches or more but less than 34 inches, 25 percent; 34 inches or more, 30 percent.

*Narrow row planting:* The above rates and the rate provided for in paragraph (c) of this section shall be increased by not less than the indicated percentages for the following row spacing: 19 inches or less but not more than 16 inches, 25 percent, 16 inches or less, 35 percent.

(c) In the fields that have been completely machine-thinned and on which chemical herbicides have been applied, removing weeds with a hoe only may be employed as a first operation: *Provided,* That the applicable piecework rate therefor shall be not less than $12 per acre.

(d) When employed on a piecework basis for hand labor operations not specified or defined, or for harvesting: The piecework rate for blocking and thinning in States other than California, weeding not qualified as a first operation under paragraph (c) of this section or not preceded by A, B, C, or E or paragraph (b) of this section, and any other hand labor operation involving the removal of beets or weeds which is not defined above, and for the operations of pulling, topping, loading, or gleaning, shall be as agreed upon between the producer and the worker: *Provided,* That the average hourly rate of earnings of each worker for each operation shall be not less than $2 per hour computed on the basis of the total time such worker is employed on the farm for such operation.

(e) When employed on a time or piecework basis for other operations: For all other operations in the production, cultivation, or harvesting of sugar beets for which no minimum rate is provided for herein, the rate shall be as agreed upon between the producer and the worker.

**§ 862.11 Compensable working time.**

For work performed under § 862.10, compensable working time includes all time which the worker spends in the performance of his duties except time taken out for meals during the workday. Compensable working time commences at the time the worker is required to start work in the field and

ends upon completion of work in the field. However, if the producer requires the operator of mechanical equipment, or any other class of worker to report to a place other than the field, such as an assembly point, tractor shed, etc., located on the farm, the time spent in transit from such place to the field and from the field to such place is compensable working time. Any time spent in performing work directly related to the principal work performed by the worker, such as servicing equipment, is compensable working time. Time of the worker while being transported from a central labor recruiting point or labor camp to the farm is not compensable working time.

**§862.12 Applicability of wage requirements.**

The wage requirements of this part apply to all persons who are employed or who work on the farm in operations directly connected with the production, cultivation, or harvesting of sugar beets on any acreage from which sugar beets are marketed or processed for the production of sugar, or any acreage which qualifies as bona fide abandoned. Such persons include field overseers or supervisors while directing other workers, and those workers employed by a custom operator who performs the above services on the farm. The wage requirements are not applicable to persons who voluntarily perform work without pay on the farm for a religious or charitable institution or organization; inmates of a prison who work on a farm operated by the prison; truckdrivers employed by a contractor engaged by the producer only in hauling sugar beets; members of a cooperative arrangement among producers for the exchange of labor to be performed by themselves or members of their families; persons who have an agreement with the producer to perform all work on a specified acreage in return for a share of the crop proceeds if such share, including the share of any Sugar Act payments, results in earnings at least as much as would otherwise be received in accordance with the requirements of this part for the work performed; custom operators and members of their immediate families; or workers performing services which are indirectly connected with the production, cultivation, or harvesting of sugar beets, including but not limited to mechanics, welders, and other maintenance workers and repairmen.

**§862.13 Payment of wages.**

(a) The producer shall make payment of wages in accordance with the following requirements: (1) Workers shall be paid by check or in currency for all work performed and shall be paid upon completion of work; (2) deductions from payments are permitted and may be made for cash advances made only by producers to workers and, in reasonable amounts agreed upon by the producer and worker, for items furnished by the producer such as meals and transportation, and for mandatory deductions or withholdings required by law; (3) deductions may not be made from wages for payment of debts originally incurred with someone older than the producer, except as required and provided under applicable garnishment statutes or by other legal process; and (4) deductions may not be made for payment to a labor contractor or supervisor for his services, or for any items which the producer agreed to furnish the worker free of charge.

(b) The producer shall furnish the worker at the time of payment of wages or, if payment of wages is made through a labor contractor or crew leader, require the labor contractor or crew leader to furnish the worker at the time of payment of wages a statement showing the producer's and worker's names, the gross earnings, the items and amounts of deductions, and the net earnings of the worker, and the producer or the labor contractor or crew leader shall obtain the worker's signature acknowledging receipt of the amount of wages received which shall in no event be less than that required by this part.

**§862.14 Evidence of compliance.**

Each producer subject to the provisions of this part shall keep and preserve, for a period of 3 years following the date on which his application for a Sugar Act payment is filed, such wage records as will demonstrate that each worker has been paid in full in accordance with the requirements of this part. Wage records should set forth dates work was performed, the class of work performed, units of work (piecework or hours), agreed upon rates per unit of work, total earnings, and any permissible deductions, and the amount paid each worker. The producer shall furnish upon request to the appropriate Agricultural Stabilization and Conservation County Committee such records or other evidence as may satisfy such committee that the requirements of this part have been met.

**§862.15 Employment of workers through a labor contractor or crew leader.**

(a) If a producer employs workers through a labor contractor or crew leader, the producer may make payment of workers' wages through such labor contractor or crew leader: *Provided,* That the producer obtain from such contractor or crew leader and have on file (1) a written record that he is registered or licensed as derived from examination of a valid certificate of registration or a farm labor contractor employee identification card; (2) a copy of his authorization signed by each worker to collect wages due each such worker, (3) a copy of each worker's statement of earnings as required by §862.13, or a wage record sheet such as the "Wage Record Sheet Sugarbeet Program" shown in Exhibit 9 of Handbook 1-SU, available in county ASCS offices, showing the names of the producer and workers, dates work was performed, description of work performed, units of work, agreed upon rates per unit, and the amounts of wages due each such worker; and (4) the signature of each worker acknowledging receipt of wages received which shall in no event be less than those required by this part. The producer is responsible for paying to the labor contractor or crew leader the fee for his services, and the producer shall have on file a statement signed by the labor contractor or crew leader showing the amount of the fee being paid by the producer to the labor contractor or crew leader for his services, and showing that such fee is over and above the wages agreed upon by the contractor and the producer which shall in no event be less than those provided by this part.

(b) Responsibility for insuring that workers actually receive the minimum wage or the agreed upon wage, whichever is higher, less only deductions authorized by this part, rests with the producer. Whenever it appears that a worker has received less than the minimum or agreed upon wage, whichever is higher, less deductions authorized by this part, the producer shall not have met the requirements of this part for eligibility for payment under the act until it is determined that all workers on the farm have been paid in full: *Provided, however,* That a producer who having acted in good faith to fulfill his obligation to insure that the minimum or agreed upon wage is actually received by the workers, has obtained and has on file documents which meet the requirements set forth in paragraph

(a) of this section and which show payment of wages in accordance with this part, shall have met the requirements of this part, except that in cases where the worker files a claim in the county ASCS office that he has not been paid wages in accordance with this part and it is found by the county committee that the worker's signature has been forged or he has been forced to sign under duress or by fraud, the producer shall not have met the requirements of this part for eligibility for payment under the act until the county committee determines that all workers on the farm have been paid in full.

**§862.16 Subterfuge.**

The producer shall not reduce the wage rates to workers below those determined herein, through any subterfuge or device whatsoever.

**§862.17 Claim for unpaid wages.**

Any person who believes he has not been paid in accordance with this part may file a wage claim with the Agricultural Stabilization and Conservation Service County Office against the producer on whose farm the work was performed. Detailed instructions and wage claim forms are available at the county ASCS office. Such claim must be filed within 2 years from the date the work with respect to which the claim is made was performed. Upon receipt of a wage claim the county ASCS office shall thereupon notify the producer against whom the claim is made concerning the representation made by the worker. The county ASCS committee shall arrange for such investigation as it deems necessary and the producer and worker shall be notified in writing of its recommendations for settlement of the claim. If either party is not satisfied with the recommended settlement, an appeal may be made to the State Agricultural Stabilization and Conservation Service Office. The address of the State ASCS Office will be furnished by the local county ASCS office. Upon receipt of the appeal the State ASC committee shall likewise consider the facts and notify the producer and worker in writing of its recommendations for settlement of the claim. If the recommendation of the State ASC committee is not acceptable, either party may file an appeal with the Deputy Administrator, State and County Operations, Agricultural Stabilization and Conservation Service.

U.S. Department of Agriculture, Washington, D.C. 20250. All such appeals shall be filed within 15 days after receipt of the recommended settlement of the respective committee, otherwise such recommended settlement will be applied in making payments under the act. If a claim is appealed to the Deputy Administrator, State and County Operations, his decision shall be binding on all parties insofar as payments under the act are concerned. Appeals procedures are set forth and explained fully in Part 780 of this title.

**§862.18 Failure to pay all wages in full.**

(a) Notwithstanding the provisions of this part requiring that all persons employed on the farm in the production, cultivation, or harvesting of sugar beets be paid in full for all such work as one of the conditions to be met by a producer for payment under the act, if the producer has failed to meet this condition but has met all other conditions, a portion of such payment representing the remainder after deducting from the payment the amount of accrued unpaid wages, may be disbursed to producer(s) upon a determination by the county committee (1) that the producer had made full disclosure to the county committee or its representatives of any known failure to pay all workers on the farm wages in full as a condition for payment under the Sugar Act, and (2) that either (i) the failure to pay all workers their wages in full was caused by the financial inability of the producer, or (ii) the failure to pay all workers in full was caused by an inadvertent error or was not the fault of the producer or his agent, and the producer has used reasonable diligence to locate and to pay in full the wages due all such workers. If the county committee makes the determination as heretofore provided in this section, such committee shall cause to be deducted from the payment for the farm the full amount of the unpaid wages which shall be paid promptly to each worker involved if he can be located, otherwise the amount due shall be held for his account, and the remainder of the payment for the farm if any, shall be made to the producer. If the county committee determines that the producer did not pay all workers in full because of an inadvertent error that was not discovered until after he received his Sugar Act payment, the producer shall be placed on the claims control record for the total amount of the unpaid wages.

(b) Except as provided in paragraph (a) of this section, if upon investigation the county committee determines that the producer failed to pay all workers on the farm the required wages, the entire Sugar payment with respect to such farm shall be withheld from the producer until such time as evidence is presented to the county committee which will satisfy the county committee that all workers have been paid in full the wages earned by them, of ir unpaid workers cannot be located and the county committee determines that the producer used reasonable diligence to locate such workers, the amounts of unpaid wages shall be deducted from the Sugar Act payment computed for the farm and the balance released to the producer after the expiration of 1 year from the date payment would otherwise be made. If payment has been made to the producer prior to the county committee's determination that all workers on the farm have not been paid in full, the producer shall be placed on the claims control record for the total payment until the county committee determines that all workers on the farm have been paid in full, the producer refunds the entire amount of the debt, or a setoff in the amount of the debt is made from a program payment otherwise due the producer, or the county committee after determining that the producer used reasonable diligence to locate such workers has recovered from such producer the amount of unpaid wages computed for the farm.

**§862.19 Child labor.**

Notwithstanding any of the foregoing provisions of this part, the act provides that the employment of workers under 14 years of age, or the employment of workers 14 and 15 years of age for more than 8 hours per day (except a member of the immediate family of a person who was the legal owner of not less than 40 percent of the crop at the time work was performed), will result in a deduction from Sugar Act payments to the producer.

**§862.20 Checking compliance.**

The procedures to be followed by county ASCS offices in checking compliance with the wage requirements of this part are set forth under the applicable sections of Handbook 1-SU issued by the Deputy Administrator, State and County Operations, ASCS. Copies of Handbook 1-SU may be inspected

at local county ASCS offices and copies may be obtained from State Agricultural Stabilization and Conservation Service offices. The address of the State ASCS office will be furnished by the local county ASCS office.

## STATEMENT OF BASES AND CONSIDERATIONS

*General.* The foregoing determination provides fair and reasonable wage rates to be paid for work performed by persons employed on the farm in the production, cultivation, or harvesting of sugar beets as one of the conditions with which producers must comply to be eligible for payments under the act.

*Requirements of the act and standards employed.* Section 301(c)(1) of the act requires that all persons employed on the farm in the production, cultivation, or harvesting of sugar beets with respect to which an application for payment is made, shall have been paid in full for all such work, and shall have been paid wages therefor at rates not less than those that may be determined by the Secretary to be fair and reasonable after investigation and due notice and opportunity for public hearing; and in making such determination the Secretary shall take into consideration the standards therefor formerly established by him under the Agricultural Adjustment Act, as amended (i.e., cost of living, prices of sugar and byproducts, income from sugar beets and cost of production), and the differences in conditions among the various sugar producing areas.

*Wage determination.* This determination differs from the prior determination in that the minimum wage rate for specified hand labor operations performed on a time basis is increased 15 cents to $2 per hour; and minimum piecework rates are increased $1 per acre for thinning and for weeding, $1.50 per acre for hoeing and for hoe-trimming, and $2.50 per acre for blocking and thinning (applicable only in the State of California).

Public hearings were held in San Francisco, Calif., Moorhead, Minnesota; Ann Arbor, Mich., San Benito, Tex., and Salt Lake City, Utah, during the period December 6 through December 17, 1971. These hearings afforded interested persons the opportunity to present testimony and make recommendations relating to fair and reasonable wage rates for sugar

beet workers. Testimony was presented by representatives of both sugar beet producers and workers.

Several producer representatives recommended that the minimum hourly and piecework wage rates established in 1971 remain unchanged for 1972. One representative recommended that rates not be increased by a comparable percentage, and that the guidelines under phase II of the Economic Stabilization Act weigh heavily in making a determination. One producer representative recommended that wages be increased up to 5.5 percent or about 10 cents per hour. Another stated that growers are rapidly turning to mechanical thinning and chemical weed control, and that any further increase in wages will speed this along, and then migrants will be unemployed in sugar beet work.

A representative of producers in one region recommended the following piecework operations and rates per acre:

A. Thinning – removing excess beets, $13.50.

B. Thinning and weeding – removing excess beets and weeds, $17.50.

C. Weeding – removing weeds (either first operation following complete machine thinning or a subsequent operation following A or B), $11.

D. Late weeding – removing weeds after July 1 and after C above, $5.

The witness stated that it is no longer necessary to specify the method of removing excess beets and weeds (with hoe or by hand) because the use of the long handled hoe has become standard, and the worker stoops to pull an occasional weed or beet because it is faster for him than using his hoe; that the hoe-trimming operation has become obsolete; that it is unfair to sugar beet growers for the wage rates for work in beets to have been set higher than the prevailing rates for other farm work, and that piecework rates are generally more satisfactory for both the worker and the grower because fast workers are not held to the earnings of slow workers, and slow workers are not denied the privilege of working.

Representatives of workers recommended that the minimum hourly wage be increased to rates ranging from $2.25 to $3, with the majority recommending that all workers be guaranteed a minimum hourly wage when working on a piecework basis. One worker representative recommended

the following piecework operations and rates per acre:

| | |
|---|---|
| Thinning | $15.00 |
| Hoeing and hoe-trimming – combined into one operation | 23.50 |
| Blocking and thinning applicable to all States | 32.00 |
| Weeding – after effective mechanical thinning and herbicide control | 13.00 |
| Weeding – as first operation | 15.00 |

The witness also recommended a guaranteed minimum hourly rate of $2.50; that growers be required notonly to pay for all work performed but to provide all the work promised in a written contract; and that arbitrators be appointed to handle wage disputes between growers and workers, with the grower appointing a representative, the worker appointing a representative, and both parties agreeing upon an attorney who would be the chief arbitrator, except that if both parties agreed that the three-man panel could be disregarded and only the lawyer act as arbitrator. The witness also recommended that a producer be denied his Sugar Act payment if he knowingly hires illegal aliens, or if he retaliates against workers for filing a wage claim. He further recommended that growers be required to provide written contracts, signed by the grower and the worker or family head, which include the number of acres to be worked, the specific job to be performed, conditions for bonuses, whether the worker will perform the second hoeing or not, the wage rate, and a description of the housing to be provided; that the grower be required to furnish to the worker without cost, housing which complies with regulations being applied under the Wagner-Peyser Act and the Occupational Safety and Health Act of 1970, any violation to result in a $100 deduction from the grower's Sugar Act payment; and that growers who recruit interstate workers be required to pay 10 cents per mile to and from the point of recruitment and the worksite and also provide travel insurance.

Several worker representatives testified that large numbers of illegal aliens were being hired for sugar beet work which prevented legal workers from getting jobs; that workers were

not paid the rates they were promised; and that workers are reluctant to take grievances to county ASC committess since they are made up of growers.

One witness testified that families of workers prefer piecework rates so that children can work, and if wage rates were high enough it would not be necessary for children to work. Department representatives pointed out to the witness that the Sugar Act prohibits the employment of children below the age of 14 years and of children 14 or 15 years of age for more than 8 hours a day. The witness said that thes regulations apparently are not enforced, because he knew of many instances where children below 14 were still working, however, he did not cite specific examples. It should be noted that the employment of child labor subjects the grower to a reduction in his Sugar Act payment of $10 for each child for each day of employment.

Supplemental briefs filed on behalf of workers concurred in most of the worker recommendations made at the hearing and, in addition, recommended that the Department set minimum wage rates that produce annual earnings above the maximum level at which a family of four is eligible for welfare payments; that are based on wages paid for similar work in nonagricultural industries; that are sufficient to attract workers to all phases of sugar production in all areas of the nation; and that account for increases in the cost of living and productivity. It was also recommended that the Department require as a condition for a Sugar Act payment that all workers benefit from all State and Federal laws which now protect nonagricultural workers.

Consideration has been given to all recommendations and testimony presented at the public hearing; to the returns, costs, and profits of producing sugar beets obtained by field survey for a prior crop and recast in terms of price and production conditions likely to prevail for the 1972 crop; and to other generally related standards normally considered in wage determinations, including the cost of living and the producers' ability to pay wages. During the past year the cost of living has increased over 4 percent. Present prospects indicate favorable overall profit position for producers. Analysis of all date and relevant factors indicates that the minimum wage rates established in this determination are fair and reasonable and

within producers' ability to pay.

The Economic Stabilization Act Amendments of 1971 provided exceptions for wages of any individual whose earnings are substandard or who is a member of the working poor until such time as the earnings are no longer substandard or he is no longer a member of the working poor. The Cost of Living Council has ruled that wages below that provided in the Fair Labor Standards Act are "substandard." It has also ruled that those earning less than $1.90 per hour are members of the "working poor." The minimum hourly rate established in this determination which became effective April 12, 1971, and 5.3 percent above the $1.90 level. That portion of the increase above $1.90 is within the Pay Board's general standard for annual wage increases of 5.5 percent. The increases in piecework rates parallel that for the hourly rate.

The recommendations of producers that the wage scale remain unchanged or increased by not more than 5.5 percent, and the recommendations of labor representatives for increases in the hourly rate from 35 to 62 percent have not been adopted. The increases in piecework rates provided in this determination which average about 8 percent are somewhat less than those recommended by worker representatives and somewhat more than the highest increase suggested by any producer representative.

The recommendations that the "Hoeing" and "Hoe-trimming" operations be combined, and that the method of removing weeds or beets (with a hoe or by hand) not be specified have not been followed. Information available to the Department indicates that each operation specified in the determination is used in one or more sections of the sugar beet area. To abolish an operation or to combine two operations to fit in with the practices in one section could upset the practices in another section. It is believed that no changes should be made in the hand labor operations until all sections of the sugar beet area have an opportunity to thoroughly study the matter and to express their views. Therefore a proposal for a change in the operations will be issued by the Department for discussion at the next series of wage hearings.

Worker representatives have again recommended that Sugar Act payments be reduced or denied producers who knowingly employ illegal aliens, retaliate against workers for

filing wage claims, do not provide written employment contracts, and fail to comply with housing and sanitation regulations; and that appointed arbitrators rather than farmer committees handle wage disputes between growers and workers.

There is a major question initially whether the Secretary has legal authority to promulgate these regulations. It is contended by those urging their adoption that legal authority exists for their promulgation in the provision of the Sugar Act authorizing the Secretary to make payments to producers who pay their workers in full "at rates not less than those that may be determined by the Secretary to be fair and reasonable." Since the enactment of the original Sugar Act in 1937, the Department has consistently interpreted that phrase as being confined to actual wage payments, and consequently not to authorize reducing or denying Sugar Act payments to producers because of their acts in the subject area of fair labor practices (except for employing child labor prohibited by an express statutory provision), labor-management relations, employment of aliens, or unacceptable housing or sanitation conditions.

The Department's interpretation is based upon the legislative history of the Sugar Act provisions requiring payment of fair and reasonable rates, the Congressional Report issued at the time of the original enactment defining these duties, and the debates which occurred in the House of Representatives when the same provision was reenacted in the Sugar Act of 1948. During the congressional hearings held in 1971 an extension and amendment of the Sugar Act, representatives of workers recommended that the Act be amended to include these same provisions which are now urged for adoption as regulations. Both the House and the Senate Committees heard testimony concerning such amendments, but refused to recommend their adoption. An amendment to the Sugar Act constituting these same proposals was then introduced on the Senate floor, but the Senate voted to defeat the amendment.

However, the U.S. District Court of Colorado in Eduardo Angel, et al. v. Clifford Hardin, No. C-2784, December 9, 1971, held that the Department did have authority to issue such regulations, but left for the Department's determination whether such regulations are desirable. While still of the opinion that legal authority to issue such regulations under the Sugar Act is absent the Department has considered the advisability of

issuing such regulations.

In determining the advisability of issuing such regulations it is important to note that each of the proposed regulations falls within a subject area that is regulated by another Act, and by another department or agency. The proposed regulation penalizing an employer who retaliates against workers for filing a complaint concerning wages or other employment conditions relates to an unfair labor practice. The Fair Labor Standards Act, administered by the Secretary of Labor, deals extensively with this subject, but Congress specifically exempted employers of various classes of agricultural workers from its provisions .

A second proposed regulation penalizing an employer who fails to enter into a written contract enters the field of labor-management relations. The National Labor Relations Act, administered by the National Labor Relations Board, deals extensively with what constitutes unfair labor relations by management. But neither this nor any other Act of which we are aware imposes a general requirement that employers must enter into a written contract. It may be noted that the Sugar Act itself authorizes the Secretary to make recommendations with respect to the terms and conditions of contracts, but it does not require anyone to accept the Secretary's recommendations nor does it require that they enter into a written contract.

A third proposed regulation penalizing an employer who knowingly hires illegal aliens appears to conflict with the terms of the Immigration and Nationality Act, administered by the Immigration Service under the Attorney General. That Act makes unlawful the "harboring" of certain aliens, but as enacted by Congress, the Act declares that employment does not constitute harboring. Several bills are now before Congress to prohibit employment of illegal aliens, but none have been enacted as of this date.

A fourth proposed regulation would penalize employers who do not comply with the housing and sanitation regulations issued under the Wagner-Peyser Act. Actually, much more comprehensive legislation covering housing and sanitation conditions of employment was enacted as the Occupational Safety and Health Act, administered by the Secretary of Labor. He has issued a proposed rule which would adopt in that Act the regulations issued previously under the Wagner-Peyser Act, as

well as other new regulations which cover housing and sanitation conditions of agricultural workers.

In light of the comprehensive treatment by Congress of the general subject areas in which the proposed regulations would fall, this Department deems it inadvisable for it to promulgate regulations which would prohibit and penalize producer actions within these subject areas.

First, the Department believes, in order to have uniform laws respecting these subject matters, applicable not merely to one class of agricultural employer, and because the proposed regulations chart a new direction having widespread impact on our society, that such proposals should be considered by and acted upon only by Congress, and not this Department. Second, the proposed regulations, if not inconsistent with the present will of Congress, would at least be inconsistent with the regulations promulgated by those departments and agencies which Congress has delegated specific authority to promulgate regulations in these subject areas. To this might be added a doubt whether this Department is as well qualified as other departments or agencies, with their many experts in such fields as labor-management relations and unfair labor practices, to draft such regulations.

Nor is it deemed advisable for this Department to attempt enforcement of the statutes entrusted to, or the regulations promulgated by other departments or agencies. This would require investigations, hearings, findings, and conclusions by this Department, which might well lead to conflicting, uncoordinated, confusing enforcement, to the detriment of those persons who seek and will be benefited by enforcement. To this might be added the inability of this Department, as a practical matter, because of limitations in personnel and money, to enforce immigration laws, housing and sanitation standards, fair labor practices, and employment conditions.

Finally, it is not deemed advisable to penalize producers by reducing or denying Sugar Act payments for violating these particular proposed regulations. It may be noted that each of the other Acts mentioned above provides its own schedule of penalties for violations. Some of these penalties are severe, but Congress did not see fit to add in the penalty provisions of those other Acts a possible loss of Sugar Act payments. The Department believes it unwise, and possibly unfair, to introduce

its own penalty, in addition to, or in substitution of those already fixed by Congress. This in no way suggests that the Department does not favor the enforcement of those other statutes and regulations by other and more proper means.

In conclusion, the Department rejects adoption of these proposed regulations not only because it believes they are not authorized by the Sugar Act, but even if they were authorized, they are deemed to be impractical and undesirable for the reasons stated above.

Worker representatives have objected to the use of county ASCS committees in wage disputes between the producer and the worker, stating that such committees are composed of producers and are, therefore, biased. Analysis of wage claims filed in the past indicates that the claim of the worker has been upheld in the vast majority of cases. Although the committee members are farmers, they are, nevertheless, competing with other producers, and they do not condone unfavorable practices by their competitors. The State and county farmer committee system was established for the purpose of administering, in the field, the provisions of the various farm programs carried out by this Department. The Sugar Act authorized the Secretary to utilize such committees to administer the provisions of the sugar program. Arbitrators appointed by individuals are not one of the agencies specified in the Act for carrying out its provisions.

The Department has not adopted the recommendation that growers who recruit interstate workers be required to pay travel allowances and provide travel insurance. The wages established in wage determinations are cash wages, and extra items such as travel allowances and insurance are matters for negotiation between the producer and the worker. In many areas workers do receive travel allowances between their home and place of employment.

The recommendation that all workers be guaranteed a minimum hourly wage has also been rejected. The Department believes that because of the makeup of the field labor force and the nature of the operation, piecework rates without a minimum hourly guarantee are necessary. It would be extremely difficult to keep accurate time records for individuals in family groups of workers, where workers are in and out of the field at all times. Fast workers should be given the opportunity

to earn up to their capabilities and slow workers should not be denied the privilege of working which might be the case with guaranteed hourly earnings. This recommendation was also considered and rejected last year by the Congress when the Sugar Act was amended and extended.

On the basis of an examination of all relevant factors, the provisions of this determination are deemed to be fair and reasonable. Accordingly, I hereby find and conclude that the foregoing wage determination will effectuate the wage provisions of the Sugar Act of 1948, as amended.

NOTE: The recordkeeping and reporting requirements of these regulations have been approved by, and subsequent recordkeeping and reporting requirements will be subject to the approval of the Office of Management and Budget in accordance with the Federal Reports Act of 1942.

*Effective date.* This determination shall become effective on April 24, 1972.

Signed at Washington, D.C., on April 12, 1972.

KENNETH E. FRICK
Administrator, Agricultural Stabilization
and Conservation Service.

## Appendix F

## SUMMARY OF PETITIONERS' PROPOSALS MADE AT 1972 WAGE RATE HEARING

(1) that in order to qualify for sugar payments, producers be required to perform all contractual obligations as well as to pay the minimum rate for work performed (Proposed Regulation §862.10);

(2) that rates for individual piecework operations be increased by amounts ranging from $2.00 to $4.00 per acre (Proposed Regulation § 862.10(a) );

(3) that the job classification known in the past as "hoeing" be deleted and the job classification known in the past as "hoe-trimming" be reclassified as hoeing (Proposed Regulation §862.10(a) (B) );

(4) that the operation known as "blocking and thinning" be made applicable to all states, not merely California (Proposed Regulation § 862.10(a) (C) );

(5) that removing weeds with a hoe be permitted as a first operation only when herbicides applied have been effective (Proposed Regulation § 862.10(b) );

(6) that the rate paid for removing weeds with a hoe as a first operation be the rate equivalent to that required for thinning rather than weeding (Proposed Regulation § 862.10(b) );

(7) that a minimum hourly wage rate of $2.50 per hour be guaranteed all workers (Proposed Regulation § 862.10(c) ).

(8) that former sections 862.10(d) and (e) be deleted;

(9) that compensable working time include time the worker spends waiting for delays for which he is not responsible;

(10) that wage claims procedures be revised to replace Agricultural Stabilization and Conservation Service (ASCS) county

committees, composed necessarily entirely of growers, with an impartial arbitration procedure (Proposed Regulation § 862.17);

(11) that factual determinations of the arbitrators be final questions of law being subject to appeal to the Deputy Administrator, State and County Operations, Agricultural Stabilization and Conservation Service (Proposed Regulation § 862.17);

(12) that if a producer fails to pay all workers in full and it is determined by the county ASCS committee that the failure was not the producer's fault, that finding be subject to arbitration if challenged by the worker (Proposed Regulation § 862.18(a));

(13) that if it is determined that the producer knowingly did not pay all workers in full (such finding by the county ASCS committee subject to arbitration if challenged by the producer), the greater of three times the amount of wages withheld or $100 be withheld from the producer's Sugar Act payment (Proposed Regulation § 862.18(b));

(14) that new regulations be adopted to subject the producer to either no Sugar Act payment or a deduction from the payment if he

(a) retaliates against the worker for asserting claims (Proposed Regulation § 862.21);

(b) knowingly employs illegal aliens (Proposed Regulation § 862.22);

(c) fails to secure a written contract, containing certain minimum provisions, signed by himself and the worker, the latter to sign before leaving home base if recruited interstate (Proposed Regulation § 862.23);

(d) fails to provide housing at no cost which complies with regulations applied under the Occupational Safety and Health Act of 1970 (Proposed Regulation § 862.24);

(e) fails to provide each worker recruited by him an interstate mileage allowance of $.10 per mile to and from the work site and health insurance adequate to cover all medical expenses incurred by the worker or members of his family during the period in which he is engaged in the production of sugar beets (Proposed Regulation §862.25).